SHAHARIAH KHALID & ANOR *a*

v.

MBF FINANCE BHD

HIGH COURT MALAYA, MELAKA *b*
LOW HOP BING J
[CIVIL APPEAL NO: (1) 12-93-2004]
19 OCTOBER 2005

CIVIL PROCEDURE: *Judgments and orders - Setting aside - Application to set aside - Defendants given 30 days to apply to set aside judgment - Five year delay - Whether inordinate - Whether there was a plausible ground to justify an extension of time for defendant to circumvent the delay point* *c*

CIVIL PROCEDURE: *Service - Substituted service - Validity of - Whether plaintiff complied with the precise terms of the order for substituted service - Whether summons effectively and validly served on the second and third defendants* *d*

HIRE PURCHASE: *Hire-purchase agreement - Default - Upon first defendant's default - Whether plaintiff entitled to claim whole outstanding balance without serving notice of termination on first defendant - Whether issuance of writ of summons by plaintiff tantamount to acceptance of first defendant's repudiation - Guarantors - Whether guarantors have taken up the position as principal debtors - Whether guarantors have jointly and severally guaranteed due and punctual payments due to plaintiff by first defendant - Whether guarantors have agreed to jointly and severally indemnify the plaintiff against all loss and damages* *e* *f*

CONTRACT: *Guarantee - Guarantor - Plaintiff's claim against defendants based on guarantee executed by second and third defendants pursuant to hire-purchase agreement - Whether guarantors have taken up the position as principal debtors in the hire-purchase agreement - Whether guarantors have jointly and severally guaranteed due and punctual payments due to plaintiff by first defendant - Whether guarantors have agreed to jointly and severally indemnify the plaintiff against all loss and damages* *g* *h*

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These were two appeals filed by the second and third defendants respectively against the decision of the sessions court judge dismissing the said defendants' application for extension of time from 8 March 1999 to the date of application *ie*, 20 January 2004 to file their respective application, and to set aside the judgments in default obtained by the plaintiff against them on 24 December 1998. The plaintiff's claim against the defendants was based on the guarantee respectively executed by the second and third defendants in favour of the plaintiff pursuant to a hire-purchase agreement entered into by the first defendant with the plaintiff. Pursuant to the guarantee, the plaintiff made a claim of RM123,830.45 against the second and third defendants. The issues that arose were (1) whether there was a plausible ground to justify an extension of time for the defendants to circumvent the delay point; (2) whether plaintiff's summons had been effectively and validly served on the second and third defendants and (3) whether the issuance of writ of summons by the plaintiff was tantamount to the acceptance of the first defendant's repudiation. It was argued for the second and third defendants that the court should consider the defence on its merits. The second and third defendants also submitted that the plaintiff had repossessed the vehicle on 26 July 1998 but sold it on 26 August 1999 without getting the highest price as the vehicle was purchased on 19 June 1997 at RM170,000.

Held (dismissing the two appeals):

[1] The plaintiff's solicitors had *via* letter dated 4 February 1999 sent a copy of the judgment by certificates of posting to the second and third defendants at their last known address given when they executed the guarantee. The second and third defendants had 30 days from 7 February 1999 *ie*, until 8 March 1999 to apply to set aside the judgment, but they had only done so after five years on 20 January 2004. There was no plausible ground to justify an extension of time for the defendant to circumvent the delay point. (pp 515 f, 516 d & 517 b)

[2] The plaintiff's summons had been served on the second and third defendants pursuant to an order for substituted service by posting a copy thereof on the notice board of the sessions court and by way of an advertisement in 'the STAR'. The plaintiff had complied with the precise terms of the order for substituted service by way of the steps adumbrated above. The second and third defendants had never challenged the validity of the order for substituted service. The summons had been effectively and validly served on the second and third defendants. (p 517 e)

[3] Under cl. 5 of the hire-purchase agreement, upon first defendant's default, the plaintiff was entitled to claim the whole outstanding balance without serving any notice of termination on the first defendant. Thus, cl. 5 made it abundantly clear that the hire-purchase agreement may be terminated by the plaintiff without any notice in the circumstances stated therein, together with the consequences flowing therefrom. In any event, the issuance of the writ of summons by the plaintiff in the instant appeals against the defendants was tantamount to the acceptance of the first defendant's repudiation. As guarantors, the second and third defendants have taken up the position as primary or principal debtors which they have expressly agreed in cl. 1 of the hire purchase agreement under which they have jointly and severally guaranteed the due and punctual payments of sums which may become due to the plaintiff by the first defendant. Pursuant to cl. 3 thereof, they have again agreed to jointly and severally indemnify the plaintiff against all loss and damage sustained by the plaintiff under the hire-purchase agreement. (pp 520 g & 521 c-e)

[4] As to the price of resale of the vehicle, the second and third defendants have not provided any evidence that the vehicle could have fetched a higher market price, and that the plaintiff had not done its best to secure the highest price possible. Therefore, the contention that the plaintiff had not resold the vehicle at the highest market price was without substance. The burden was on the second and third defendants to prove that the plaintiff had not acted reasonably in the resale. They have failed to do so. (p 521 f-g)

Case(s) referred to:

Credit Corporation (M) Bhd v. Bulan Sabit Sdn Bhd & Ors [1989] 1 CLJ 912; [1989] 1 CLJ (Rep) 444 HC ***(refd)***

Colonel Lim Poh Weng & Anor v. Probo Pacific Leasing Pte Ltd [1993] 3 SLR 662 ***(refd)***

Evans v. Bartlam [1937] AC 473 ***(refd)***

Hong Leong Finance Bhd v. Lee Cheng Heng t/a Lee Cheng Heng Earthworks & Anor [1987] 2 MLJ 266 ***(refd)***

Industrial Resources Sdn Bhd v. Awang Tahir Hj Hamzah [1988] 2 MLJ 359 ***(refd)***

Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 CA ***(refd)***

Koperasi Belia Nasional Bhd v. Storage Enterprise (Port Kelang) Sdn Bhd [1998] 3 CLJ 335 CA ***(refd)***

Lee Cheng Yin t/a Perniagaan Jia Zing Ten v. MBf Finance Bhd [2005] 6 CLJ 479 HC ***(refd)***

Leong Weng Choon v. Consolidated Leasing (M) Sdn Bhd [1998] 3 CLJ 619 CA ***(refd)***

Malayan United Bank Bhd v. Mohammed Salleh Mohammed Yusoff & Ors [1988] 2 CLJ 460; [1988] 1 CLJ (Rep) 762 HC ***(refd)***
MBf Finance Bhd v. Cahaya Luas Sdn Bhd & Ors [2002] 5 CLJ 32 HC ***(refd)***
Ng Han Seng & Ors v. Scotch Leasing Sdn Bhd [2003] 4 CLJ CA ***(refd)***
OCBC Bank (Malaysia) Bhd & Anor v. Sin Lee Meng Farm Sdn Bhd & Ors [2002] 7 CLJ 433 ***(refd)***
Public Bank Bhd v. Chan Siok Lie & Ors [1989] 2 MLJ 305 ***(refd)***
SD Quarry Sdn Bhd & Ors v. MBf Finance Bhd [2002] 1 LNS 34 ***(refd)***
Sungei Way Leasing Sdn Bhd v. Goh Nai Khoo [1997] 2 CLJ Supp 541 HC ***(refd)***
Thambipillai v. Borneo Motors (M) Ltd [1970] 1 MLJ 70 ***(refd)***
Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 FC ***(refd)***

Legislation referred to:
Subordinate Courts Rules 1980, O. 29 r. 14, O. 42 r. 13

For the plaintiff - TT Leong; M/s Tunku Amiruddin & KK Chiew
For the 2nd & 3rd defendants - J Amardas; M/s KP Ng & Amardas

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Appeals

Before me are two appeals which were filed by the second and third defendants respectively against the decision of the learned sessions court judge who had on 5 November 2004 dismissed with costs the said defendants' application for extension of time from 8 March 1998 to the date of application ie, 20 January 2004 to file their respective application, and to set aside the judgments in default obtained by the plaintiff against them on 24 December 1998.

Factual Background

The plaintiff's claim against the defendants was based on the guarantee respectively executed by the second and third defendants on 19 June 1997 in favour of the plaintiff pursuant to a hire-purchase agreement dated 19 June 1997 entered into by the first defendant with the plaintiff in respect of a vehicle serial No. Hino FS630B bearing registration No. JFN 2709. It is not disputed that the vehicle is outside the purview of the Hire-Purchase Act 1967. The total hire-purchase price is RM217,125 and the amount payable thereunder is RM177,125. The monthly instalment under the agreement is RM2,890 for 60 months, the final instalment being RM2,952.

Pursuant to the guarantee, the plaintiff has made a claim of RM123,830.45 against the second and third defendants as at 18 June 1998 with interest at 1.16% per month from 18 June 1998 to the date of realisation.

The plaintiff's summons had been served on the second and third defendants pursuant to an order for substituted service by posting a copy thereof on the notice board of the sessions court and by way of an advertisement in "the STAR", and that such service was deemed to be effective and valid service.

Extension Of Time

It was submitted by Mr. J. Amardas, learned counsel for the second and third defendants, that the second defendant only knew of the judgment when the third defendant informed her of it, and that the third defendant in turn knew of the judgment after his sister had received the plaintiff's letter in respect of the bankruptcy notice. However, it was conceded that the judgment had been served on the second and third defendants on 4 February 1999, and that the application was filed on 20 January 2004, some five years later.

For the plaintiff, learned counsel Miss T.T. Leong stressed that the five-year delay is inordinate, referring to *Ng Han Seng & Ors v. Scotch Leasing Sdn Bhd* [2003] 4 CLJ 533 CA; *Koperasi Belia Nasional Bhd v. Storage Enterprise (Port Kelang) Sdn Bhd* [1998] 3 CLJ 335 CA; *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396 CA; and *Lee Cheng Yin t/a Perniagaan Jia Zing Ten v. MBF Finance Bhd* [2005] 6 CLJ 479 HC.

In my judgment, it is appropriate to set out in proper perspective the circumstances surrounding the aforesaid delay.

At pp. 59 to 62 of the appeal record, the plaintiff's solicitors had *via* letter dated 4 February 1999 sent a copy of the judgment by certificates of posting to the second and third defendants at 222-2, Jalan Meriam, 84000 Muar and at 48 Jalan Abdul Rahman 84000 Muar respectively, which were exactly the same addresses which they have given when they executed the guarantee. They have not informed the plaintiff of their change of addresses. As the above addresses were the respective last known address of the second and third defendants, the said letter enclosing the judgment sent to the second and third defendants is conclusively deemed to have been received by them within forty-eight hours after the time of posting, as expressly agreed by them in cl. 4 of the guarantee in the following words:

> 4. I/we further agree that my/our obligations hereunder shall be binding on my/our personal representatives and that any demand made by you hereunder shall be validly made if served on me/us personally or sent to me/us by prepaid ordinary post to or left at my/our address stated below or to or at my/our current business or private address or that last known to you and if sent by post shall be conclusively deemed to have been received by me within forty-eight hours after the time of posting.

Order 29 r. 14 of the Subordinate Courts Rules 1980 (= O. 42 r. 13 of the Rules of the High Court 1980) provides as follows:

> **14 Setting aside or varying judgments and Orders (O. 29 r. 14)**
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> Where in these rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the judgment within 30 days after the receipt of the order or judgment.

That being the case, the second and third defendants have 30 days from 7 February 1999 ie, until 8 March 1999 to apply to set aside the judgment, but has only done so after five years.

Order 42 r. 13 was considered by the Court of Appeal in *Ng Han Seng, supra,* where there was an unexplained delay of two months by the first and third appellants, and seven months by the second appellant in filing their respective application to set aside the judgment in default. Nik Hashim JCA (now FCJ) speaking for the Court of Appeal at p. 536 b-d held that the merits of the defendants' application could not be considered and the application itself should be dismissed in limine.

In *Koperasi Belia Nasional, supra,* the sealed copy of the *ex parte* judgment was served on the defendant on 3 February 1994 but the defendant's application to set aside the judgment was made more than 30 days, in contravention of O. 42 r. 13. The Court of Appeal in three separate judgments delivered respectively by NH Chan JCA (as he then was), Abu Mansor Ali, JCA (later FCJ), and Abdul Malek Ahmad JCA (now PCA) unanimously affirmed my decision in dismissing the defendant's application on the ground that it was filed out of time.

Next, the Court of Appeal through the judgment of Gopal Sri Ram JCA in *Khor Cheng Wah, supra,* held, *inter alia,* that where a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously (p. 229D-E) and that the burden is on the litigant who has delayed

to render a satisfactory explanation for it (p. 229F). The second and third defendants herein have given no satisfactory explanation in relation to the five-year delay.

In *Lee Cheng Yin, supra,* there was a delay of five years and 11 months by the defendant in filing the application to set a side a default judgment, as a result of which I held that the delay was inordinate and detrimental to the defendant's application.

Having anxiously considered the defendant's delay, I am of the view that the weight of authorities is clearly against the defendants. I therefore hold that there is no plausible ground to justify an extension of time for the defendant to circumvent the delay point.

Service Of Summons

For the second and third defendants, it was submitted that the summons had not been served on the second and third defendants and so the judgment in default is a nullity.

The plaintiff's contention is that substituted service has been effected through an order of the court.

In my judgment, the short answer is that the second and third defendants had never challenged the validity of the order for substituted service. The plaintiff has complied with the precise terms of the order for substituted service, by way of the steps adumbrated above. There can be no doubt in my mind that the summons had been effectively and validly served on the second and third defendants. I therefore hold that there is no merit in the contention raised for the second and third defendants and that the judgment in default is a regular judgment.

Merits Of Defence

It was argued for the second and third defendants that the court must consider the defence on its merits, on the basis of *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad* [1996] 1 CLJ 241 FC; and *Evans v. Bartlam* [1937] AC 473 HL.

The second and third defendants added that:

1. the notices demanded a sum of RM8,859 but judgment was entered for RM123,830.45 before the hire-purchase agreement was terminated;

2. the plaintiff had repossessed the vehicle on 26 July 1998 but sold it on 26 August 1999 for RM28,000 without getting the highest price, as the vehicle was purchased on 19 June 1997 at RM170,000; and

3. the plaintiff has not served the notice of demand on all the defendants and the hire-purchase agreement was only terminated on 25 July 1998.

The following authorities were cited:

1. *Leong Weng Choon v. Consolidated Leasing (M) Sdn Bhd* [1998] 3 CLJ 619 CA;

2. *MBf Finance Bhd v. Cahaya Luas Sdn Bhd & Ors* [2002] 5 CLJ 32 HC;

3. *Sungei Way Leasing Sdn. Bhd. v. Goh Nai Khoo* [1997] 2 CLJ Supp 541 HC;

4. *Malayan United Bank Berhad v. Mohammed Salleh bin Mohammed Yusoff & 3 Ors.* [1988] 2 CLJ 460; [1988] 1 CLJ (Rep) 762;

5. *Credit Corporation (M) Bhd v Bulan Sabit Sdn Bhd & Ors* [1989] 1 CLJ 912; [1989] 1 CLJ (Rep) 444 HC; and

6. *Hong Leong Finance Berhad v. Lee Cheng Heng t/a Lee Cheng Heng Earthworks & Anor.* [1987] 2 MLJ 266 HC.

The plaintiff contended that:

1. under cl. 5 of the hire-purchase agreement, upon first defendant's default, the plaintiff was entitled to claim the whole outstanding balance without serving any notice of termination on the first defendant, relying on *Thambipillai v. Borneo Motors (M) Ltd.* [1970] 1 MLJ 70 FC;

2. the issuance of the summons by the plaintiff against the defendants is tantamount to the acceptance of the first defendant's repudiation, on the basis of *Colonel Lim Poh Weng & Anor v. Probo Pacific Leasing Pte Ltd* [1993] 3 SLR 662 Singapore CA; and *Public Bank Bhd v. Chan Siok Lie & Ors* [1989] 2 MLJ 305 HC;

3. The notices of demand dated 10 June 1998 to the second and third defendants are sufficient notices and that under cl. 1 and 3 of the hire-purchase agreement their liability is a primary obligation, referring to *SD Quarry Sdn Bhd & 2 Ors v. MBF Finance Berhad* [2002] 1 LNS 34 HC; and

4. Repossession of the vehicle has not taken place when the plaintiff's summons and claim was filed on 24 June 1998 and that the vehicle was resold at a reasonable price in the light of *OCBC Bank (Malaysia) Bhd & Anor v. Sin Lee Meng Farm Sdn Bhd & Ors* [2002] 7 CLJ 433; and *Industrial Resources Sdn. Bhd. v. Awang Tahir bin Haji Hamzah* [1988] 2 MLJ 359 HC Brunei.

As the default judgment is a regular judgment, I am of the view that the application of the second and third defendants and by extension this appeal should be heard on merits (see *Tuan Hj. Abdul Rahman, supra,* per Edgar Joseph Jr FCJ (as he then was); and *Evans v. Bartlam, supra,* per Lord Atkin.)

For this purpose, I shall first consider the authorities cited for the second and third defendants.

In *Leong Weng Choon, supra,* by a hire-purchase agreement, the plaintiff let to the first defendant a luxury air-conditioned coach ("the bus"). The appellant guaranteed payment of all sums of money due from and by the first defendant to the plaintiff. The first defendant defaulted in the payment of the monthly rentals. The bus had been seized and confiscated by the customs. The plaintiff's statement of claim pleaded that the first defendant by defaulting on the payment of the instalments had terminated the agreement and obtained judgment against the appellant although the statement of claim made no claim for the arrears.

On appeal, the Court of Appeal through the judgment of NH Chan JCA (as he then was) held that the contract was subsisting since the plaintiff did not elect to terminate it.

It is to be noted that in *Leong Weng Choon, supra,* the facts are entirely different from those in the instant appeal. It is also distinguishable in that the vehicle there was subject to the Hire-Purchase Act 1967 while the vehicle in the instant appeal is not.

The hire-purchase agreement in *Hong Leong Finance, supra,* was also subject to the Act and so is distinguishable from the hire-purchase agreement in this appeal.

Cahaya Luas, supra, concerns an application for summary judgment and the judgment of Su Geok Yiam JC (now J) was in relation to the existence of triable issues. In my view, different principles apply in the case of an application to set aside a default judgment in this appeal before me (see *Lee Cheng Yin, supra*).

In *Sungai Way Leasing, supra,* the subject matter was a lease agreement. Jeffrey Tan J held, *inter alia*, that the termination of the lease was not a precondition to the appellant making a demand on the respondent on the basis of cl. 7 of the guarantee therein.

In *Credit Corporation, supra,* the subject matter was also a lease agreement. Shankar J (later JCA) made a distinction between a hire-purchase agreement and a lease agreement.

The ratio in *Malayan United Bank, supra,* was that the judgment in default in question was irregular as the interest had exceeded the statutory rate and hence it was set aside *ex debito justitiae*.

It is abundantly clear to me that none of the above authorities is of any assistance to the second and third defendants.

Reverting to the facts in the instant appeal, it is useful to refer to the relevant portion of cl. 5 of the hire-purchase agreement in the following words:

> 5. If the hirer shall
>
> (a) make default in punctually paying the initial payment or any of the hire rentals or any other sums payable under the Agreement (whether demanded or not), or
>
> (b) …
>
> (c) …
>
> (d) …
>
> (e) do any act or thing which in the Owner's opinion may prejudice or jeopardize its rights of ownership of the goods; or
>
> (f) …
>
> then it shall be lawful for the Owner (but without prejudice to the Owner's claim for arrears of hire or damages for breach of Agreement and without discharging any liability of the Hirer to the Owner) without notice to terminate this hiring …

The above provisions in cl. 5 make it abundantly clear that the hire-purchase agreement may be terminated by the plaintiff without any notice in the circumstances stated therein, together with the consequences flowing therefrom.

Clause 5 above has found an almost corresponding provision in cl. 9 of the hire-purchase agreement in *Thambipillai, supra,* which merits reproduction as follows:

If the hirer shall make default in payment of any monthly sum payable hereunder for seven days after the same shall have become due (whether payment thereof shall have been demanded or not) … it shall be lawful for the owners:

(a) without notice to terminate the hiring and resume possession of the vehicle and for that purpose to enter upon any premises where the vehicle may be,

(b) …

Gill FJ (later CJ (M)) delivered judgment for the Federal Court and held that there was no ambiguity in cl. 9 of the agreement when read as a whole and under cl. 9(a) the owners were entitled to terminate the hiring without notice.

In my view, in any event, the issuance of the writ or the summons by the plaintiff in the instant appeals was tantamount to the acceptance of the repudiation: *Colonel Lim Poh Weng, supra,* per Karthigesu JA (Singapore). The writ itself is a notice: per Shankar J (later JCA) in *Public Bank v. Chan Siok Lie, supra,* at p. 308 rt column.

As guarantors, the second and third defendants have taken up the position as primary or principal debtors which they have expressly agreed in cl. 1 of the hire-purchase agreement under which they have jointly and severally guaranteed the due and punctual payments of sums which may become due to the plaintiff by the first defendant. Pursuant to cl. 3 thereof, they have again agreed to jointly and severally indemnify the plaintiff against all loss or damage sustained by the plaintiff under the hire-purchase agreement (see eg, the judgment of Richard Malanjum J (now FCJ) in *SD Quarry Sdn Bhd, supra*).

As to the price on resale of the vehicle, it is to be noted that the second and third defendants have not provided any evidence that the vehicle could fetch a higher market price, and that the plaintiff has not done its best to secure the highest price possible. Therefore, the contention that the plaintiff has not resold the vehicle at the highest market price is without substance: see also *OCBC (Bank), supra,* per T Selventhiranathan J.

The burden is on the second and third defendants to prove that the plaintiff had not acted reasonably in the resale: see *Industrial Resources Sdn Bhd, supra,* per Sears J (Brunei). They have failed to do so.

Conclusion

On the foregoing grounds, I am unable to find any error in the decision of the court below which I hereby affirm. Hence I dismiss these two appeals with costs.